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ALEXANDER L. STEVAS,

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT M. NESMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.***PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**ROBERT I. WHITE
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CHAMBERLAIN, HRDLICKA, WHITE,
JOHNSON & WILLIAMS

QUESTIONS PRESENTED

1. Whether the three-year statute of limitations under Internal Revenue Code Section 6501(a) (26 U.S.C.) governs the assessment and collection of taxes when the taxpayer files a good faith nonfraudulent amended income tax return in an attempt to correct his original fraudulent return.
2. Whether a taxpayer is entitled to a refund of taxes assessed and collected by the Commissioner of Internal Revenue within the two-year period prior to the issuance of a statutory notice of deficiency, when the assessment and collection was barred by limitations and the taxpayer has requested a determination of an overpayment by timely petition to the Tax Court.

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ROBERT M. NESMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner Robert M. Nesmith respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit (App. A, *infra*, p. 1a) is reported at 699 F.2d 712 (5th Cir. 1983). The Opinion of the United States Tax Court (App. C, *infra*, p. 6a) is unofficially reported at 42 Tax Ct. Memo. Dec. (CCH) 1269 (1981), and P-H Memo. T.C., par. 81,561 (1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. B, *infra*, p. 5a) was entered on March 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 6501 of the Internal Revenue Code of 1954 (26 U.S.C.), as amended, provides in pertinent part:

§ 6501. *Limitations on assessment and collection*

(a) *General rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

* * *

(e) *Substantial omission of items.*—Except as otherwise provided in subsection (c)—

(1) *Income taxes*.—In the case of any tax imposed by subtitle A—

(A) *General rule*.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

* * *

STATEMENT OF THE CASE

Robert M. Nesmith (hereinafter "Taxpayer" or "Nesmith") and his wife timely filed joint individual income tax returns with the Internal Revenue Service for the taxable years 1970, 1971 and 1972. Taxpayer prepared these original returns from his best estimates rather than from accurate books and records. Taxpayer therefore knew that the original returns were inaccurate, but did not know how inaccurate they were.

Taxpayer was contacted by Revenue Agent F. Mike Harrell on June 5, 1973, regarding the examination of Taxpayer's 1971 income tax return. Soon thereafter, the examination was extended to the years 1970 and 1972. In response to this examination, Taxpayer retained legal counsel and a certified public accountant, and he instructed these professionals to prepare accurate amended income tax returns based on income and expense information derived from the Taxpayer's bank records for the years in issue.

Taxpayer and his wife filed amended income tax returns in December of 1973. The three amended returns reported additional taxable income, which resulted in additional income taxes and interest. Taxpayer remitted the following amounts of funds to the Internal Revenue Service Center with his amended returns:

<u>Taxable Year</u>	<u>Additional Tax</u>	<u>Interest</u>	<u>Total Remitted</u>	<u>Date Received by IRS Service Center</u>
1970	\$6,015.64	962.50	6,978.14	December 14, 1973
1971	6,455.03	645.50	7,100.53	December 17, 1973
1972	9,028.34	361.13	9,389.47	December 14, 1973

Nesmith's intent to defraud the Government by filing his original returns, if any such intent ever existed, had been terminated by the time of the preparation and filing of Taxpayer's amended returns. Although Taxpayer had omitted from his original returns gross income in excess of twenty-five percent of the gross income stated on those returns, the amended returns were true and correct in every material way.

Taxpayer's case was referred to the Intelligence Division of the Internal Revenue Service on January 7, 1974. The Taxpayer and his counsel cooperated with this IRS criminal investigation by providing the investigating agents with all the workpapers prepared by Taxpayer's accountant as well as Taxpayer's underlying bank records. Both Taxpayer and his accountant were made available for interviews. By April 22, 1974, the Internal Revenue Service had determined through an analysis of Taxpayer's bank records that the amended returns were materially correct and accurate.

On February 22, 1977, Taxpayer pleaded nolo contendere to one count of income tax evasion under Section 7201 of the Internal Revenue Code.¹ The two remaining counts were deferred until sentencing. On March 22, 1977, United States District Judge Ross N. Sterling sentenced the Taxpayer to three years supervised probation and to pay \$10,000.00 on the pleaded count. The other two counts were dismissed upon the Government's motion. The Tax Division of the Department of Justice closed the criminal case against the Taxpayer on July 14, 1977.

Nevertheless, it was not until November 18, 1977, that the Internal Revenue Service assessed the taxes shown on the three amended returns that had been filed in December of 1973. Simultaneously with the assessment of the taxes shown on Taxpayer's three amended returns, the Internal Revenue Service credited the funds submitted by Taxpayer in December of 1973 as payment of the taxes assessed.

It was not until December 1, 1978, that the Commissioner mailed a statutory notice of deficiency to the Taxpayer. This notice was based on the amended returns, but it disallowed deductions for contributions to a retirement plan and asserted additions to the tax under Section 6653(b)² for each of the three years in issue. The Commissioner's notice of deficiency thus was issued more than three years after the filing by Taxpayer of the three amended returns. Also, the additional income taxes shown on Taxpayer's amended returns were assessed (and the amounts remitted with the amended returns were col-

1. All section references are to the Internal Revenue Code of 1954, 26 U.S.C., as amended and in effect for the years in issue.

2. Commonly known as the "civil fraud penalty."

lected) more than three years after the date of filing those returns.

Taxpayer petitioned the United States Tax Court (pursuant to the jurisdictional provisions of Section 7442) for a redetermination of the deficiencies and additions to tax proposed in the Commissioner's statutory notice. In an amended petition, Taxpayer claimed a refund of the amounts remitted with the amended returns, on the theory that the assessment and collection of those amounts were untimely. In light of the Tenth Circuit decision in *Dowell v. Commissioner*, 614 F.2d 1263 (1980), rev'g, 68 T.C. 646 (1977), stipulations of fact were entered which effectively submitted the case to the Tax Court solely on the legal issue of the timeliness of the Commissioner's actions. Taxpayer stipulated, for the purposes of the instant case and not for the purposes of any other litigation, that at the time of filing the original returns Taxpayer intended to evade and defeat a part of the income taxes due and owing from himself and his wife for the years in issue. Taxpayer further stipulated that the original returns were false and fraudulent.

The Tax Court agreed with Taxpayer's position that the filing of a good faith amended return invoked the three-year statute of limitations, and a decision was entered determining that no deficiencies or additions to tax were due from Taxpayer for the years in issue. The Tax Court further determined that Taxpayer's claim for refund was also proper under the same theory.

The Commissioner appealed to the United States Court of Appeals for the Fifth Circuit. On March 7, 1983, the Court of Appeals reversed the decision of the Tax Court, and this Petition followed.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

BOTH QUESTIONS PRESENTED ARE DETERMINED BY THE IDENTICAL ISSUE OF LAW PRESENTLY BEFORE THE COURT IN TWO OTHER CASES ON WRIT OF CERTIORARI.

On May 16, 1983, the Court granted two petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit. *Badaracco v. Commissioner*, 51 U.S.L.W. 3818 (U.S., May 16, 1983) (No. 81-1453), granting cert. to 693 F.2d 298 (3rd Cir. 1982); *Deleet Merchandising Corp. v. U.S.*, 51 U.S.L.W. 3818 (U.S., May 16, 1983) (No. 82-1509), granting cert. to 693 F.2d 298 (3rd Cir. 1982). Each of these two pending cases concerns whether the three-year statute of limitations of Section 6501(a) of the Internal Revenue Code commences upon the filing of a non-fraudulent amended income tax return by a taxpayer who originally filed a fraudulent return. The same question of law is presented in the instant case.

Although there are two questions of law presented in the instant case, both are determined by the issue presently before the Court in *Badarraco* and *Deleet Merchandising Corp.* The first issue is identical to the one presented in the two cases to be reviewed from the Third Circuit, *i.e.*, whether the filing of a non-fraudulent amended income tax return starts the running of the three-year statute of limitations under Section 6501(a). The second issue concerns whether Taxpayer is entitled to a refund of the additional income taxes (and interest) paid with his

amended income tax returns. The propriety of this refund claim turns on the fact that the Internal Revenue Service assessed and collected the additional taxes more than three years after the filing of the amended returns. If the Court determines that the three-year statute of limitations barred the assessment and collection of additional taxes remitted by Taxpayer with his amended tax returns, then Taxpayer is entitled to a refund of the amounts submitted with his amended returns, together with deficiency interest assessed and collected by the Internal Revenue Service, and statutory interest on the total.³

The facts of the instant case are essentially equivalent to the facts presented in the two cases for which the Court has previously granted review. In all three cases, the taxpayer originally filed fraudulent income tax returns, but later filed non-fraudulent amended returns covering the same taxable years. More than three years after the filing of the amended returns, the Internal Revenue Service attempted to assess and collect the taxes reported by the taxpayers on their amended returns.

The only material difference between the instant case and the two cases presently pending before the Court is that Taxpayer's original fraudulent returns were stipulated to have omitted gross income in excess of twenty-five percent of the gross income stated on those returns. Thus, the Commissioner argued alternatively on appeal that

3. In briefing the instant case to the United States Tax Court, the Commissioner raised several arguments concerning the Tax Court's jurisdiction to determine Taxpayer's claim for refund. The Commissioner did not appeal from the Tax Court's ruling that it had jurisdiction to determine overpayments of taxes for the years in issue. Thus, both parties submitted the case to the Court of Appeals with the assumption that the propriety of the refunds depended upon the decision on the main issue concerning the statute of limitations.

assessment and collection of the taxes reflected on the original returns could be considered timely by virtue of the six-year limitations period provided by Section 6501(e). The Commissioner's conclusion, which was persuasive to the court below, has been summarily rejected by two other Circuit Courts of Appeals, and by the Tax Court in an opinion reviewed by the full court. *Britton v. United States*, 697 F.2d 288 (2d Cir. 1982), aff'g by mem., 532 F. Supp. 275 (D. Vt. 1981); *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980); *Klemp v. Commissioner*, 77 T.C. 201 (1981), govt. appeal pending, No. 81-7744 (9th Cir.). Thus, Taxpayer respectfully suggests that the instant case should be consolidated with the two cases presently pending before the Court, so that in resolving the main issue the Court may also define the interplay between the three-year period of limitations under Section 6501(a) and the six-year limitations period of Section 6501(e).

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND TENTH CIRCUITS AND THE UNITED STATES TAX COURT.

The decision below continues the disparity among the Circuit Courts in the application and enforcement of the federal tax laws. The main issue herein has been decided in four Courts of Appeals to date. The decisions of the Fifth Circuit in the instant case and the Third Circuit in *Deleet Merchandising Corp.* and *Badaracco* are in direct conflict with the decisions rendered by the Second Circuit in *Britton* and the Tenth Circuit in *Dowell*. In

addition, the issue is presently pending before the Court of Appeals for the Ninth Circuit in *Klemp v. Commissioner*, No. 81-7744 (9th Cir.), appealing from 77 T.C. 201 (1981).

The decision below also conflicts with the decision of the United States Tax Court as expressed in *Klemp*, which was a decision reviewed by the full court. This Court has frequently noted the special expertise of the Tax Court in interpreting the interrelationships of the sections of the Internal Revenue Code. *E.g.*, *United States v. Allen-Bradley Co.*, 535 U.S. 306, 311 (1957) (Harlan, J., concurring); *Arrowsmith v. Commissioner*, 344 U.S. 6, 12 (1962) (Jackson, J., dissenting).

The uniform application and enforcement of the federal tax laws is of great significance, both to Taxpayers and the Government. The Court recognized the importance of resolving this conflict when it granted the petitions filed in *Badaracco* and *Deleet Merchandising Corp.*

III.

THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF STATUTORY INTERPRETATION IMPORTANT TO THE ADMINISTRATION OF FEDERAL TAX LAW.

The opinion below recognizes that the statute and its legislative history, regulations, and policy considerations, can lead to differing results concerning the interpretation of the statute. The decision was rendered subsequent to the extensive opinions of the Tenth and Third Circuits and the Tax Court, so that the Fifth Circuit recognized in the opinion below (699 F.2d at 713-14, Appendix, *infra*, page 4a):

There is little we can add to the two circuits' discussion of this important question. The arguments for the two possible constructions of § 6501 have been ably stated by the Tenth and Third Circuits and the Tax Court. We follow the Third Circuit's decision in *Badaracco* for the reasons stated in that opinion.

Because statutes of limitations are of prime importance in the administration of law, the construction of the instant statute should not be left open to conflicting interpretations.

Taxpayer submits that there is a lack of direction in the Internal Revenue Code concerning the effect of filing nonfraudulent amended returns. Due to this lack of clarity, the Court's critical inquiry should go beyond the literal words of the statute relied upon in the opinion below and in the Third Circuit's decision in *Badaracco*. The best attempt to distill the meaning and intent of the statute was made in the several opinions filed by the Tax Court in *Klemp*, but this Court's promulgation of a consistent interpretation of the Internal Revenue Code is mandated.

IV.

THE DECISION BELOW THREATENS THE PUBLIC FISC BY UNDERMINING A BEDROCK PRINCIPLE OF THE INTERNAL REVENUE CODE.

Our system of taxation depends on voluntary self-assessment and encouragement to taxpayers to report accurate tax information to the Government. This fundamental principle of the Internal Revenue Code is undermined by a statute of limitations that is determined by the geographical location of the taxpayer's place of residence,

as is now the case in light of the conflict among the Circuit Courts. Within Taxpayer's circuit, full and accurate reporting is no longer encouraged, because the Government is afforded an unlimited assessment period once a fraudulent return has been filed. This result tends "to discourage the conscientious taxpayer who might desire to correct errors made in the original [return]" and it imposes "an obstacle to honesty in dealing with the Government." *National Refining Co. of Ohio v. Commissioner*, 1 B.T.A. 236, 241 (1924).

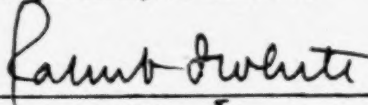
The Internal Revenue Code provides an unlimited assessment period for fraud and failure to file cases in order to allow sufficient time to investigate tax liabilities where the Commissioner has been placed at a disadvantage in detecting errors. *See, The Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958). Once an accurate amended return is filed, however, the investigation should be limited to the express statutory limitations for proper tax returns. The decision below has a chilling effect on all taxpayers who might otherwise be willing to correct previous fraudulent returns, and Taxpayer respectfully submits that the better rule is to encourage corrective reporting and create an incentive for taxpayers to comply with the voluntary self-assessment system created by the Code.

By filing a corrected return, a taxpayer essentially concedes the civil and criminal penalties attendant to his original fraudulent filing. The suspension of limitations prescribed in Section 6501(c) does not continue as a further punitive measure. The good-faith, nonfraudulent, amended return obviates the need for an unlimited assessment period by giving the Government all the information it needs to protect the public fisc.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted and that this case should be consolidated with the two cases presently pending before the Court on the identical issue.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert I. White", is written over a horizontal line.

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APPENDIX A

ROBERT M. NESMITH,
Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant.

No. 82-4162.

United States Court of Appeals,
Fifth Circuit.

March 7, 1983.

Appeal from the Decision of the United States Tax Court.

Before WISDOM, RUBIN and TATE, Circuit Judges.

PER CURIAM:

The taxpayer claims the three year statute of limitations of I.R.C. § 6501(a) (1976)¹ began to run when he filed non-fraudulent amended income tax returns, notwithstand-

1. I.R.C. § 6501 (1976) provides in relevant part:

(a) Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(c) Exceptions.

(1) False Return. In the case of a false return or fraudulent return with intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

ing the fact that his original returns were admittedly fraudulent. The Tax Court agreed. However, we interpret the statute as imposing no limitations period under such circumstances, and reverse.

Nesmith and his wife filed fraudulent joint income tax returns for the years 1970, 1971 and 1972. In 1973, after the Internal Revenue Service (IRS) initiated an investigation of the Nesmiths, they filed amended returns for these years. The amended returns were not fraudulent. The Nesmiths paid the IRS the additional taxes shown as due by the amended returns. The IRS, however, indicated that the sums received would be held as bond against payment of additional taxes to be assessed at a later time.

In 1977, after criminal proceedings against Robert Nesmith were completed, the IRS assessed the taxes shown on the amended returns and credited the amounts previously received from Nesmith against those taxes. In 1978, the IRS notified the Nesmiths that it had determined they owed further deficiencies because it had disallowed certain deductions taken on the amended returns and it had assessed a civil fraud penalty pursuant to I.R.C. § 6653(b) (1976).

The Nesmiths challenged all of these assessments before the Tax Court. That court determined that the assessments were time-barred by § 6501(a) because they were made more than three years after the Nesmiths filed their amended returns. The court rejected the Commissioner's claim that the assessments were timely made under § 6501(c)(1) because the original returns were fraudulent. Therefore, the court ruled that the Nesmiths were not liable for the deficiencies. Moreover, because the assessments were made more than three years after the amended

returns were filed, the Nesmiths were entitled to a refund of the amount paid with the amended returns. *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1299 (1981). The IRS appealed.

The circuits are divided as to whether the filing of an amended, nonfraudulent return triggers the § 6501(a) statute of limitations when the original return was fraudulent. In *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), the Tenth Circuit ruled that the limitations period is started by such an amended return. It relied on the ruling in *Bennett v. Commissioner*, 30 T.C. 114 (1958), *acq.*, 1958-2 C.B. 3, in which the Tax Court held that, when a taxpayer filed a belated return, after having filed no return at all, the filing commenced the limitations period. The *Dowell* court concluded that the same result should obtain when a nonfraudulent amended return was filed some time after a fraudulent initial return. The fraudulent return was equivalent to no return at all because it did not represent the "honest and genuine effort to satisfy the law" required by *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S.Ct. 127, 79 L.Ed. 264 (1934). Therefore, the filing of the nonfraudulent amended return following the filing of a fraudulent one, like the tardy filing of a nonfraudulent return, started the running of the statute of limitations. The *Dowell* decision has been followed by the Second Circuit and the Tax Court. See *Britton v. United States*, 532 F.Supp. 275 (D. Vt. 1981), *aff'd mem.*, 697 F.2d 288 (2d Cir. 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1982), *appeal docketed*, No. 81-7744 (9th Cir. November 5, 1981).²

2. *Accord Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Galvin v. Commissioner*, 45 T.C.M. (CCH) 221 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Derfel v. Commis-*

In *Badaracco v. Commissioner*, 693 F.2d 298 (3d Cir. 1982), the Third Circuit took a contrary view, holding that the filing of a nonfraudulent amended return did not trigger the § 6501(a) statute of limitations if the original return was fraudulent. The opinion, written by Judge Arlen Adams, relied on what it considered to be the plain meaning of § 6501(c)(1), which provides that “[i]n the case of a false or fraudulent return with intent to evade tax,” the Commissioner may assess the tax or proceed in court without an assessment “at any time.” *Id.* The court then examined the legislative history, regulations, and policy considerations. It found no reason to construe § 6501(c)(1) in a manner inconsistent with its unambiguous meaning.

We reserved the question raised by this case in *Woolf v. United States*, 578 F.2d 1103, 1106 (5th Cir. 1978), and we have not had the opportunity to consider it since. There is little we can add to the two circuits’ discussion of this important question. The arguments for the two possible constructions of § 6501 have been ably stated by the Tenth and Third Circuits and the Tax Court. We follow the Third Circuit’s decision in *Badaracco* for the reasons stated in that opinion. Therefore, we conclude that the amended returns filed by the Nesmiths did not trigger the § 6501(a) statute of limitations.³

For these reasons, the decision of the Tax Court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

sioner, 44 T.C.M. (CCH) 45 (1982); *Elliot Liroff v. Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982).

3. Because of the conclusions we reach on the § 6501(a) issue, we need not consider the Commissioner’s alternative argument that the Nesmiths consented to extend the statute of limitations period.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-4162

ROBERT M. NESMITH,
Petitioner-Appellee,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant.

Appeal from the Decision of the United States Tax Court

Before WISDOM, RUBIN and TATE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said Tax Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that respondent-appellant pay to petitioner-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 7, 1983

ISSUED AS MANDATE: MARCH 29, 1983

APPENDIX C

T. C. Memo. 1981-561

UNITED STATES TAX COURT

ROBERT M. NESMITH, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 13849-78.

Filed September 29, 1981.

Petitioner filed false and fraudulent original income tax returns for 1970, 1971, and 1972. On December 14, 1973, petitioner filed nonfraudulent amended returns for 1970 and 1972, and on December 17, 1973, petitioner filed a nonfraudulent amended return for 1971. The Commissioner, more than three years after filing all of the amended returns and more than six years after filing the original returns for 1970 and 1971, mailed a statutory notice of deficiency to petitioner covering all three taxable years. The Commissioner, more than six years after filing the original returns for 1970, assessed the taxes shown on the amended returns for all three years. *Held*, The filing of the amended returns commenced the running of the three-year period of limitations on assessment; therefore, assessment of additional tax is barred by the statute of limitations because the statutory notice was not mailed by the Commissioner within that three-year period. *Klemp v. Commissioner*, 77 T.C. ____ (Aug. 5, 1981), followed. *Held further*, the six-year period of limitations provided in sec. 6501(e), I.R.C. 1954, did not apply. *Klemp v. Commissioner, supra*, followed. *Held*

further, for purposes of the period of limitations which limits the amount of refund or credit of taxes that may be allowed where an overpayment is determined, payment of the tax was made when respondent assessed the tax, so that petitioner is entitled to a refund of such overpayments.

Robert I. White and Larry A. Campagna, for the petitioner.

John F. Eiman, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GOFFE, *Judge*: The Commissioner determined the following deficiencies in and additions to the petitioner's Federal income tax:

<u>Year</u>	<u>Deficiency</u>	<u>Addition to Tax¹ Sec. 6653(b),² I.R.C. 1954</u>
1970	\$ 72.27	\$3,043.96
1971	112.29	3,283.66
1972	142.26	4,585.30

The issues for decision are:

(1) whether the filing of nonfraudulent amended returns, subsequent to the filing of fraudulent returns, commenced the running of the three-year period of limitations in section 6501(a) so as to bar the assessment and col-

1. The additions to tax are larger than the deficiencies because the deficiencies are based on the amended returns while the additions to tax are based on the original returns. The additions to tax are determined against Robert M. Nesmith only and not against Dixie L. Nesmith.

2. All section references are to the Internal Revenue Code of 1954, as amended.

lection of the proposed deficiencies and the additions to tax for fraud for the taxable years 1970, 1971, and 1972, or whether assessment and collection are timely under either section 6501(c)(1) or under sections 6501(e) and 6501(c)(4);

(2) whether this Court has jurisdiction to determine an overpayment of taxes by petitioner, and, if so, whether petitioner overpaid his Federal income taxes; and

(3) to what extent, if any, is refund of the overpayment barred by the statute of limitations.

FINDINGS OF FACT

Most of the facts have been stipulated. The stipulations of facts and attached exhibits are incorporated herein by this reference.

Petitioner Robert M. Nesmith resided in Leander, Texas, when he filed his petition in this case. Petitioner and his wife timely filed joint Federal income tax returns for the taxable years 1970, 1971, and 1972. (These returns will be referred to as petitioner's "original" returns.) For purposes of this case the petitioner concedes the fraudulent nature of his original returns.

On June 5, 1973, a representative of the Commissioner contacted petitioner regarding examination of petitioner's and his wife's 1971 income tax return. The examination was soon extended to the taxable years 1970 and 1972. Petitioner contacted an attorney to provide him legal counsel concerning the examination of the original returns. This attorney advised the petitioner to "lay low" and not cooperate with the government. The attorney even suggested that petitioner plead the Fifth Amend-

ment. Petitioner became very nervous and upset about following this advice. Petitioner told his attorney that he did not want to handle the case in the manner advised but that he wanted to "get to the truth of these returns and get them made up right." When the attorney did not agree to cooperate with petitioner's intended action, petitioner dismissed him. Petitioner asked one of his relatives, who is an attorney, to recommend new counsel. The relative referred petitioner to Robert I. White.

Petitioner contacted Mr. White in October of 1973. Mr. White immediately contacted a representative of the Commissioner to meet regarding petitioner's audit. This action pleased petitioner. In talking with petitioner about the matter, Mr. White learned that the original returns had not been prepared from books and records but rather from estimates. Mr. White recommended that he and petitioner engage a CPA to prepare proper books and records from petitioner's bank records and other documents. This was done. Petitioner worked closely with Mr. White and the CPA to prepare an accurate account of income and expenses for the taxable years in issue. After these books and records were prepared and after petitioner reviewed them, petitioner authorized Mr. White to have true and accurate amended returns prepared, which he did. Petitioner intended to file accurate returns and fully pay his Federal income taxes.

The petitioner and his wife signed these amended returns (the "amended" returns) and filed them. The Director, Austin Service Center, received the amended 1970 and 1972 returns on December 14, 1973, and the amended 1971 return on December 17, 1973. These amended returns reported additional taxable income which resulted

in additional income tax liability in the following amounts, which were remitted with the amended returns:

<u>Taxable Year</u>	<u>Amount</u>
1970	\$6,978.14
1971	7,100.53
1972	9,389.47

The Commissioner notified the petitioner and his wife by letters dated February 12, 1974, and January 31, 1975, that the funds would be held by the Commissioner as cash bonds for payment of taxes, if any, that might be assessed at a later date. These letters indicated that for a period of 30 days subsequent to such notification, the petitioner could request a return of the funds held as a cash bond. No claim for refund was appropriate at that time because the cash bond was not applied as payment of any assessment of any taxes for any year.

The petitioner and his counsel cooperated with the Commissioner's investigation by providing both petitioner's bank records and the accountant's workpapers that were used to prepare the amended returns as well as by making the petitioner and the CPA available for interviews and statements. The Commissioner analyzed petitioner's bank records and determined, by April 22, 1974, that the amended returns were correct and accurate in every material way.³

Mr. White, acting for petitioner pursuant to a power of attorney, executed a series of four agreements extending the period of limitations on assessment and collection. The first agreement extended the period for assessment of

3. The deficiencies result from the disallowance of deductions to a retirement plan.

Federal income tax due from petitioner for the taxable year 1970 to April 15, 1975. The second agreement extended the period for assessment of petitioner's 1970 Federal income tax liability to December 31, 1977, but was conditioned on the applicability of the six-year period of limitations under section 6501(e). The third agreement similarly extended the period for assessment of 1970 and 1971 tax liability to June 30, 1978, and was also conditional on the applicability of section 6501(e). The fourth and final agreement executed by the petitioner on March 29, 1978, and by the Commissioner on April 3, 1978, extended the period for assessment of the Federal income tax liability of petitioner for the taxable years 1970, 1971, and 1972 to December 31, 1978.

Petitioner omitted from the original returns filed for himself and his wife gross income in excess of 25 percent of gross income stated on the returns.

The respondent assessed the taxes shown to be due on the amended returns on November 18, 1977. On December 1, 1978, the Commissioner mailed a statutory notice to petitioner and his wife in which he disallowed deductions claimed for contributions to a retirement plan and in which he determined that petitioner was liable for addition to tax under section 6653(b).

ULTIMATE FINDINGS OF FACT

Petitioner did not intend to defeat or evade the income tax when he filed his amended returns for the taxable years 1970, 1971, and 1972.

OPINION

The first issue concerns whether the assessment and collection of the proposed deficiencies in tax and addi-

tions to tax for the taxable years 1970, 1971, and 1972 were barred by the running of the period of limitations when the Commissioner mailed his statutory notice of deficiency.⁴ The pertinent parts of section 6501 provide as follows:⁵

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *.

* * *

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

* * *

4. Petitioner does not contest the amount of the proposed deficiencies and additions to tax if assessment and collection are not barred.

5. Section 250(d) of the Revenue Act of 1921, ch. 136, 42 Stat. 265, for the first time provided for a period of limitations on assessment and collection of taxes. Section 250(d) required the Commissioner of Internal Revenue to determine and assess taxes within four years after a return was filed. With respect to a false or fraudulent return or a failure to file a required return, section 250(d) retained the prior rule that no period of limitations for determining and assessing taxes was begun. Now, of course, the three-year period in section 6501(a) replaces the previous four-year period of section 250(d) and section 6501(c)(1) continues the previous rule that no period of limitation is begun by filing a false or fraudulent return.

(e) SUBSTANTIAL OMISSION OF ITEMS.—Except as otherwise provided in subsection (c)—

(1) INCOME TAXES.—In the case of any tax imposed by subtitle A—

(A) GENERAL RULE.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

Petitioner argues that his filing of nonfraudulent amended returns subsequent to his filing of fraudulent original returns invoked the three-year period of limitations in section 6501(a), and the three-year period of limitations commenced to run upon the filing of the amended returns. Respondent argues that the applicable period of limitations was determined by the nature of the fraudulent original returns and was the unlimited period provided by section 6501(c)(1). It is uncontroverted that the statutory notice was mailed after the general three-year period of limitations, whether that period begins to run from the time of filing either the original or the amended returns. Respondent has the burden of proving that the period of limitations is other than the three-year general rule, e.g., *Farmers Feed Co. v. Commissioner*, 10 B.T.A. 1069 (1928). Respondent contends that no language in section 6501 and no subsequent action by petitioner rendered section 6501(c)(1) inapplicable or served to bring section 6501(a) into operation. Respondent also argues that the petitioner omitted from gross income amounts in excess of 25 percent of the gross income stated in the

original returns, so that the period of limitations is at least six years from the original return and thus the mailing of the statutory notice was timely as to the taxable years 1970 and 1971 because of the agreed-to extensions of the period for assessment.⁶

We recently decided this same question in the petitioner's favor in an opinion that involved a factual situation almost identical to the present one. *Klemp v. Commissioner*, 77 T.C. ____ (Aug. 5, 1981). Our decision in *Klemp* is dispositive of the first issue in the present case. We, therefore, hold that the periods of limitations on assessment and collection of the proposed deficiencies and additions to tax determined by respondent for the taxable years 1970, 1971, and 1972 expired before the mailing of the statutory notice of deficiency.

The second issue for decision is whether there exists an overpayment of tax. Respondent challenges this Court's jurisdiction to consider whether an overpayment might be due to petitioner.

We will first consider the jurisdictional issue. The pertinent portions of sections 6512 and 6511 provide as follows:

SEC. 6512. LIMITATIONS IN CASE OF PETITION TO TAX COURT.

(a) EFFECT OF PETITION TO TAX COURT.—
If the Secretary has mailed to the taxpayer a notice of

6. These agreements extending the period of limitations are valid only to the extent that the six-year period under section 6501(e) applies because the second and third agreements were so conditioned and because the validity of the fourth agreement required that the period of limitations be open when it was executed. Only the six-year period of limitations remained open at the time of the execution of the fourth agreement and, therefore, only such period was capable of being extended. Sec. 6501(d)(4).

deficiency under section 6212(a) * * * and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), no credit or refund of income tax for the same taxable year * * * in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(b) OVERPAYMENT DETERMINED BY TAX COURT.—

(1) **JURISDICTION TO DETERMINE.—*** * * if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year * * * in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * *

(B) within the period which would be applicable under section 6511(b)(2), (c), (d), or (g), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * *.

* * *

SEC. 6511. LIMITATION ON CREDIT OR REFUND.

* * *

(b) LIMITATION ON ALLOWANCE OF CREDITS AND REFUNDS.—

* * *

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—

* * *

(B) LIMIT WHERE CLAIM NOT FILED WITHIN 3-YEAR PERIOD.—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

When the Commissioner mails the taxpayer a notice of deficiency and the taxpayer timely files a petition with the Tax Court, section 6512(a) authorizes credits and refunds as to overpayments determined by a decision of the

Tax Court. Such an overpayment is refundable to the taxpayer when the decision of the Tax Court becomes final.⁷ The Tax Court's authority to determine an overpayment is found in section 6512(b)(1) which requires that the Tax Court first find whether a deficiency exists and whether the taxpayer has made an overpayment. We have already found that no deficiency exists. Section 6401 provides in pertinent part that:

SEC. 6401. AMOUNTS TREATED AS OVER-PAYMENTS.

(a) **ASSESSMENT AND COLLECTION AFTER LIMITATION PERIOD.**—The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

The taxes remitted with the amended returns were assessed after the expiration of the three-year period of limitations on assessment under section 6501(a), which applied to these taxable years, so that these funds constitute overpayments under section 6401(a). This Court, therefore, has jurisdiction under section 6512(b)(1) to determine the amount of the overpayment which must be refunded to petitioner.

Section 6512(b)(2) limits the amount of such credit or refund to only that portion paid either after the deficiency notice is mailed or within the period of limitations for filing a refund claim under section 6511(b)(2), (c), (d), or (g) which could have been refundable if a claim

7. To determine when a Tax Court decision has become final, see sec. 7481.

had been filed on the date the notice of deficiency was mailed, or under certain specified conditions, where a timely refund claim was actually filed. Respondent's jurisdictional argument is that the requirements of section 6512 are not met because the tax liabilities were not paid within any of the time periods specified under section 6511 as they relate to the limit on the amount of any credit or refund in section 6512(b)(2)(B). This Court must determine what amount of petitioner's tax was paid within the time periods specified under sections 6511 and 6512(b)(2)(B) in order to determine the amount of petitioner's refundable overpayments. This determination depends on the meaning of the word "paid" for purposes of these limitation statutes.

Petitioner maintains that the amounts which he remitted with the amended returns were "paid" on November 18, 1977, when the respondent assessed the taxes shown as due on the amended returns, so that the payments were made within two years of the mailing of the notice of deficiency on December 1, 1978. It would follow, then, that such payments would be refundable under section 6512(b)(2)(B) because the payments were made within the two years immediately preceding the mailing of the notice of deficiency under section 6511(b)(2)(B). Under section 6512(b)(2)(B) a claim for refund is deemed to be filed on the date of the mailing of the notice of deficiency. Respondent contends that a remittance prior to assessment by the Commissioner is a payment which will begin the running of the period of limitations under section 6511 if the remittance is intended to satisfy a defined tax liability, which respondent suggests is present when a taxpayer states a liability on his return. Under

this interpretation of "payment" the amounts which petitioner remitted with his amended returns would not have been "paid" within any of the time periods in section 6511 referred to in section 6512(b)(2)(B) and refund of such payments would be barred.

The Supreme Court addressed a similar issue in *Rosenman v. United States*, 323 U.S. 658 (1945). That case involved the collection of federal estate taxes. The taxpayer remitted sums under protest which the government placed in a suspense account rather than assessing the tax and applying the remittance against the assessment. Allowance of the taxpayer's refund depended on when the tax was "paid," whether on the date of remittance or on the subsequent date of assessment. The Court held that payment was made on the date of assessment. Prior to that time the Commissioner held the sums remitted in a suspense account, as the Commissioner did in the case before us. This was apparently done because the sums were remitted under protest. The Supreme Court explained that:

Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due. * * * [*Rosenman v. United States*, 323 U.S. at 662.]

This is precisely the action that the Commissioner stated, in his letters to petitioner herein of February 12, 1974, and January 31, 1975, he was taking regarding the petitioner's remittance which accompanied his amended returns. In addition, the Supreme Court in *Rosenman* explained why payment must be considered to be made at the time of assessment, for purposes of the period of limitations on suits for refunds:

It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made * * *. [*Rosenman v. United States*, 323 U.S. at 661.]

The Supreme Court's decision in *Rosenman* was followed by the Fifth Circuit in *Thomas v. Mercantile Nat. Bank at Dallas*, 204 F.2d 943 (5th Cir. 1953). *Thomas* also concerned a claim for refund of federal estate taxes. In affirming the District Court's holding that the claim for refund was timely because the date of payment was the date of assessment, the Fifth Circuit explained that:

Until the Commissioner certified the assessment list * * * there was no deficiency assessment, and no liability on the part of the taxpayer, and consequently nothing to pay * * *. It would be illogical to hold, as the United States contends, that the statute of limitation began to run against a claim for refund before the deficiency itself came into existence, and before the fact that there was an overpayment, and if so the amount thereof, became ascertainable. [*Thomas v. Mercantile Nat. Bank at Dallas*, 204 F.2d at 944.]

In *Roseman*, as in the instant case, the Commissioner placed the sums remitted in a suspense account. The Fifth Circuit in *Thomas*, however, explained that:

The fact that in the *Rosenman* case the funds were placed in a suspense account, and not, as here, credited directly to the account of the taxpayer, does not alter the situation. * * * [*Thomas v. Mercantile Nat. Bank at Dallas*, 204 F.2d at 944.]

Although the period of limitations may now be a different length of time or may now be expressed in a slightly different but essentially similar framework than at the time of the *Rosenman* and *Thomas* decisions, these differences have no substantive effect on the issue of when payment is determined to have occurred.

Under the rule of *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971), we will follow the decisions of a United States Court of Appeals to which a case before us is appealable which are squarely in point with such case. *Golsen v. Commissioner*, 54 T.C. at 757. This is such a case.⁸ We are compelled by the decision in *Thomas* to hold that in this case, for the purposes of the period of limitations limiting the amount of refund or credit that may be allowed where an overpayment is determined, payment of the tax was made when the tax was assessed.⁹ We hold for petitioner.

To reflect the foregoing,

*Decision will be entered
under Rule 155.*

8. The Fifth Circuit recently reaffirmed the precedential value of *Thomas v. Mercantile Nat. Bank at Dallas*, 204 F.2d 943 (5th Cir. 1953), in *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980). The panel in that case expressed doubts about the rule but refused to overturn the decision of a previous Fifth Circuit panel because such an action required the decision of the Circuit *en banc*. The doubts of the Fifth Circuit panel were apparently created by decisions of other courts finding that the date of assessment does not always control for all purposes, notably in the area of when interest begins to run against the government. E.g., *Fortugno v. Commissioner*, 353 F.2d 529 (3d Cir. 1965), cert. dismissed 385 U.S. 954 (1966).

9. But compare, *Dowell v. Commissioner*, T.C. Memo. 1980-515.